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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,

Appellant,

—v.—

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, *AMICI CURIAE*, IN SUPPORT OF JURISDICTIONAL STATEMENT

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Interest of *Amici*[1]

The American Civil Liberties Union is a fifty-three year old non-partisan organization engaged solely in defense of the rights protected by the Bill of Rights. First among those rights are the freedoms of speech and the press. The Florida statute involved in this case (Sec. 104.38, Florida Statutes), and the decision of the Supreme Court of Florida holding that statute constitutional, is an immediate threat to the freedom of the press. We believe that Sec. 104.38 is so clearly offensive to the First Amendment that summary reversal is justified. If the Court

[1] This brief is filed with the consent of both parties. The letters of consent are filed with the Clerk of the Court.

disagrees with our suggestion of summary reversal, then jurisdiction should surely be noted.

Statute Involved

Sec. 104.38, Florida Statutes:

> Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Statement of the Case

Tornillo, leader of the Dade County Classroom Teachers' Association, was a candidate for the nomination of the Democratic Party in the Florida House of Representatives in the Fall of 1972. The Miami Herald published an editorial in September 1972 opposing Tornillo's election, calling him a "czar" and a lawbreaker who engaged in an "illegal act against the public interest." The editorial stated that it would "be inexcusable of the voters if they sent Pat Tornillo to Tallahassee" (J.S. A45).[2] The paper ran a second editorial the following week, five days before the election, which said (J.S. A47):

> "For years now [Tornillo] has been kicking the public shin to call attention to his shakedown statesmanship . . . Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

On September 30, 1972, Tornillo requested *The Miami Herald* to print verbatim and free of cost a statement submitted by him, pursuant to Section 104.38, Florida Statutes. *The Miami Herald* did not print the material submitted by Tornillo. Tornillo did not request a retraction pursuant to Sec. 770.02, Florida Statutes, or otherwise claim that the editorials were libelous, untrue, or inaccurate.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for the Eleventh Judicial Circuit seeking

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[2] The symbol J.S. refers to the Jurisdictional Statement filed by appellant in this Court.

to require *The Miami Herald* to publish his "reply," and to obtain damages. Circuit Judge Francis J. Christie held an emergency hearing on the matter on October 2, 1972. The Attorney General was notified of the suit pursuant to Sec. 86.091, Florida Statutes, requiring notice of any action in which a statute is alleged to be unconstitutional, and he was represented at the hearing.

At the hearing, the Court was advised that the Attorney General had refused to appeal a decision by Volusia County Judge J. Robert Durden which had held Sec. 104.38 unconstitutional, because the Attorney General himself had reservations about the constitutionality of the statute. That case, *State* v. *News-Journal,* 36 Fla. Supp. 164 (Volusia County, Fla., Judges Ct. 1972) was apparently the first case brought under Sec. 104.38 since its enactment in 1913. The Attorney General advised Judge Christie that his opinion was unchanged since the *News-Journal* case, and that he continued to have doubts as to the constitutionality of Sec. 104.38, and therefore would not defend the statute.

At the conclusion of the hearing, Judge Christie ordered Tornillo's case dismissed with prejudice, holding the statute void on its face as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, denied due process of law under the Fourteenth Amendment because of its vagueness and ambiguity. On appeal, the Florida Supreme Court reversed, holding Sec. 104.38 constitutional, one Justice dissenting.

ARGUMENT

The decision of the Florida Supreme Court is so plainly wrong, it should be summarily reversed.

This Court has been historically consistent in resisting attempts by the federal and state governments to invade or diminish the right of newspapers freely to choose the material they will put into print. Whether the attempts have taken the form of prior restraints,[3] subsequent punishments,[4] discriminatory taxes,[5] or inhibiting forms of libel actions,[6] the Court has uniformly recognized that the purpose of the First Amendment is to insure and encourage a free press as a fundamental instrument of political liberty. Even so conservative a jurist as Mr. Justice Sutherland appreciated the indispensability of a free press in a free society. Speaking for the Court in *Grosjean* v. *American Press Co., supra* at 250, he described the function of a free press in the following terms:

> ". . . since informed public opinion is the most important of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . . A free press stands as one of the

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[3] *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times* v. *United States*, 403 U.S. 713 (1971).

[4] *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Mills* v. *Alabama*, 384 U.S. 214 (1966).

[5] *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

[6] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Butts* v. *Curtis Publishing Co.*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971).

> great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

The same appreciation permeates the Court's opinion thirty years later in *Mills* v. *Alabama*, 384 U.S. 214 (1966). Mr. Justice Black's opinion for the Court said (at 219):

> "Suppression of the right of the press to praise or criticise governmental agents and to clamor and contend for or against change . . . muzzles . . . the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

The fact is that the freedom of the press in the United States has been, and is constitutionally required to be, virtually absolute, as least so far as news and comment upon public affairs are concerned, and certainly where election of public officials is concerned.[7] Apart from one case authorizing a prior restraint upon publication of a critical analysis of the Central Intelligence Agency by a former employee,[8] and (arguably) this Court's decision last term in *Pittsburgh Press* v. *Pittsburgh Commission on Human*

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[7] As this Court said in *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964):

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

[8] *Marchetti* v. *United States*, 466 F.2d 1309 (4th Cir. 1972), cert. denied 409 U.S. 1063 (1972). A suit to review the constitutionality of deletions ordered by the Central Intelligence Agency from the completed book is now pending. *Knopf, Marchetti and Marks* v. *Colby and Kissinger*, No. 540-73-A, E.D. Virginia. Cf. *New York Times* v. *United States*, 403 U.S. 713 (1971).

Relations, 37 L. Ed. 2d 669 (1973), no case since *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407 (1921), is to be found which upholds the power of the federal or state governments to forbid the exercise of free editorial choice or which punishes the press for exercising that choice.[9] That historical fact is a precious feature of our political system, and should it be diluted it would change the face of our society.

The decision of the Florida Supreme Court in this case violates the "clear command that Government must never be allowed to lay its heavy editorial hand on any newspaper in this country." *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations, supra* at 687 (Stewart, J., dissenting). It is such a radical departure from common understanding of the meaning and utility of the First Amendment, it warrants swift and summary reversal.

The opinion of the Florida Supreme Court would have this Court believe and adopt its assertions that ". . . this statute [F.S. Sec. 104.38] enhances rather than abridges freedom of speech" (J.S. A3); and that "The First Amendment did not create a privileged class which through a monopoly of instruments of the newspaper industry would be able to deny to the people the freedom of expression

[9] *Dickinson* v. *United States*, 476 F.2d 373 (5th Cir. 1973), cert. denied 42 U.S.L.W. 3237 (October 23, 1973), if viewed charitably, could be said not to be another exception to this general principle. Literally, *Dickinson* could be said neither to forbid nor to punish, but only to postpone publication pending appeal of the contempt. Realistically, *Dickinson* must be said to punish publication of constitutionally protected information relating to a public trial, since the district court order at issue in that case had all the judicial legitimacy of a "letter to a newspaper." *United States* v. *United Mine Workers*, 330 U.S. 258, 309-310 (1947) (Frankfurter, J., concurring).

which the First Amendment guarantees" (J.S. A9). But those statements are at best clichés which ignore five hundred years of history[10] and rest upon no reasoned inquiry whatever into the history or function of the First Amendment.[11]

There has been a theory advanced in recent years which would attempt to justify the imposition upon newspapers

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[10] See Siebert, Freedom of the Press in England, 1476-1776 (Univ. of Ill. Press 1952), pp. 117-20, 380-92; *New York Times* v. *Sullivan, supra* at 269-278.

[11] The superficial quality of the Florida Supreme Court's opinion is captured by the following excerpt from its opinion (J.S. A11):

> "Although we have carefully considered appellee's argument that Red Lion Broadcasting Co. v. Federal Communications Commission [395 U.S. 367 (1969)], supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,
>
> 'Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communcation.' 395 U.S. at 401, n. 28."

That quotation from this Court's opinion in *Red Lion* is actually a shocking distortion of note 28. That footnote is a mere aside by the Court which acknowledges but expressly declines to deal with two additional arguments put forward in defense of the fairness doctrine. Thus, the quotation, as stated by the Florida Supreme Court, begins in the middle of the third sentence of note 28 and simply neglects to include its opening words:

> *"A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic,* Congress does not abridge freedom of speech . . . etc., etc." (emphasis added).

The source of the distorted version of note 28 is found at pp. 34-35 of the Brief for Appellant in the Florida Supreme Court. Presumably the Florida Supreme Court innocently accepted that version of the quote.

of the duty reflected by the statute at issue in this case. See Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Barron, Access—The Only Choice For the Media?, 48 Tex. L. Rev. 766 (1970); Barron, Freedom of the Press For Whom? The Right of Access to Mass Media (Indiana U. Press 1973). The theory has been put forward unsuccessfully in other cases, in less radical form. Those cases claimed not that one had a right to seize editorial or news space as in this case, but the narrower claim that one had the right to require privately owned newspapers to sell advertising space to those who wished to publish so-called editorial advertisements. But even that claim has been uniformly rejected. *Chicago Joint Board* v. *Chicago Tribune Co.*, 435 F.2d 471 (7th Cir. 1970); *Opinion of the Justices* (Sup. Jud. Ct. of Mass.), 42 U.S. Law Week 2074 (Aug. 13, 1973).

Indeed, a majority of this Court has already let it be known that the statute in this case is constitutionally impermissible. In *Columbia Broadcasting Co.* v. *Democratic National Committee,* 36 L. Ed.2d 772 (1973), the question was whether broadcasters were required to sell time to groups which wished to broadcast short editorial advertisements. The Court held they were not, though the question was thought difficult and debatable. Debatable as *that* question may have been to the Court, six Justices, including the two dissenters, agreed that there was no constitutionally tenable argument to support a claim of access to the print media. 36 L. Ed.2d at 792 (Burger, CJ., and Rehnquist, J.), 808 (Stewart, J.), 811-812 (Douglas, J.), 829, n. 12 (Brennan and Marshall, JJ.). As Mr. Justice Brennan, one of the dissenters put it:

> ". . . the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made in the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers." *Supra* at 829, n. 12.

Since intrusion into news or editorial columns is more oppressive than compulsory sale of advertising space, it necessarily follows that the opinion of the Florida Supreme Court in this case is wholly without merit and that Sec. 104.38 unarguably violates the First Amendment.

CONCLUSION

Jurisdiction should be noted and the decision below should be summarily reversed.

Respectfully submitted,

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